

The record considered by the Appeals Board is the same as that specifically set forth by the Administrative Law Judge in his Award dated January 28, 1994.

### STIPULATIONS

The Appeals Board adopts the stipulations as set forth by the Administrative Law Judge in his Award dated January 28, 1994.

### ISSUES

The Administrative Law Judge found that claimant was entitled to workers compensation benefits for an injury that claimant sustained on September 14, 1992, while working for Tony Derewenko, a sub-contractor of the respondents Pat Pendergast and Bill Sixta, d/b/a Pendergast Group. The Administrative Law Judge found that claimant was a statutory employee of Pat Pendergast and Bill Sixta and entered an award against them. Both the claimant and respondent Bill Sixta filed requests to review the Award of the Administrative Law Judge. The issues now before the Appeals Board are:

- (1) Whether the injury sustained by claimant arose out of and in the course of his employment with Tony Derewenko.
- (2) Whether claimant gave proper notice of injury. If not, was there prejudice?
- (3) Did the relationship of employer/employee exist between claimant and Tony Derewenko on the date of the accident? If so, is claimant entitled to receive benefits from Pat Pendergast and Bill Sixta pursuant to the provisions of K.S.A. 44-503?
- (4) Did the sub-contractor, Tony Derewenko, have a payroll of \$10,000.00 in order to bring him under the provisions of the Kansas Workers Compensation Act?
- (5) Are respondents Pat Pendergast and Bill Sixta financially unable to pay compensation as required by the Workers Compensation Act to permit an order to be entered against the Workers Compensation Fund to pay claimant benefits under K.S.A. 44-532a?
- (6) Whether claimant is entitled to payment of medical expense — past, present and future.
- (7) Claimant's entitlement to additional temporary total disability benefits.
- (8) Whether the Administrative Law Judge erred by failing to mention the penalty that was previously assessed under K.S.A. 44-512a as set forth in his Order dated April 23, 1993.
- (9) Whether the Administrative Law Judge erred in crediting the \$600.00 payment made by Bill Sixta against temporary total compensation rather than against the penalty assessed.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds, as follows:

(1) For the reasons expressed below, the Award of the Administrative Law Judge dated January 28, 1994, and Order Nunc Pro Tunc dated February 2, 1994, should be modified to require the Kansas Workers Compensation Fund to pay the benefits due and owing the claimant pursuant to the provisions of K.S.A. 44-532a.

The claimant sustained an accidental injury on September 14, 1992, arising out of and in the course of his employment with Tony Derewenko, a contractor hired by Pat Pendergast and Bill Sixta, d/b/a Pendergast Group.

(2) Claimant provided timely notice of accident to his immediate employer, Tony Derewenko. Further, respondent Pendergast admits that he received notice of accidental injury on September 15, 1992, in a conversation he had either with his business associate Sixta or contractor Derewenko.

(3) The relationship of employer/employee existed between the claimant and Tony Derewenko on the date of the alleged accident. On the date of accident, the relationship of principal and contractor existed between respondents Pat Pendergast and Bill Sixta, d/b/a Pendergast Group, and Tony Derewenko.

The evidence is uncontroverted that Pendergast and Sixta were engaged in a business enterprise to build residential homes and share the profits utilizing the name Pendergast Group for this unincorporated association. Although it is not related to the outcome of this proceeding, Pendergast and Sixta were formerly business associates in an architectural firm. It is to be noted that the liability for workers compensation benefits placed upon Pendergast and Sixta does not arise out of their former architectural firm, but rather out of their construction enterprise.

The Appeals Board finds that the respondent Sixta hired Derewenko to frame one of the homes that he and Pendergast were building. At the time of entering this contract, Sixta was acting on behalf of himself and Pendergast in the furtherance of their construction enterprise. It was on this property that claimant sustained his work-related accident.

Pursuant to the provisions of K.S.A. 44-503, the claimant has requested workers compensation benefits from the respondents Pendergast and Sixta. K.S.A. 44-503 provides:

“(a) Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of

compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed.”

Analyzing the facts in this proceeding now before us in light of K.S.A. 44-503, the Appeals Board finds that the respondents Pendergast and Sixta are principals and that their trade or business in their construction enterprise was the construction of new homes. The claimant, as an employee of contractor Derewenko, is entitled to receive benefits from respondents Pendergast and Sixta under the provisions of the above cited statute as if he would have been immediately employed by Pendergast and Sixta.

Respondent Sixta contends that he should not be held liable as he had terminated his relationship with respondent Pendergast prior to claimant's accident. The Appeals Board disagrees with this contention. Derewenko was hired to further the business venture of Pendergast and Sixta. Therefore, Sixta became one of the principals under K.S.A. 44-503 in connection with that framing contract. The termination of the business relationship between Pendergast and Sixta may affect the rights and duties between them, but said termination cannot affect the obligations to third parties such as claimant. The Kansas Supreme Court has noted that the rights and duties of the Workers Compensation Act are contractual in nature. Moeser v. Shunk, 116 Kan. 247, 226 P. 784 (1924). Therefore, contract principals are appropriate in this analysis and claimant should be treated similar to a third-party beneficiary.

Respondent Sixta also contends that claimant was an independent contractor rather than an employee of Derewenko. The Appeals Board finds that this contention has no merit. Claimant was hired by Derewenko to do work on his framing crew. There is no question that Mr. Derewenko retained the right to hire and fire members of his crew. Further, Derewenko provided tools for the crew, including saws, nail guns, wall jacks, levels, and ladders. The evidence is uncontroverted that Derewenko exercised an absolute right of control over claimant and other members of his crew which is consistent with the employment relationship.

(4) The Appeals Board finds that the framing company of Tony Derewenko is subject to the Kansas Workers Compensation Act as the payroll exceeded \$10,000.00 for the calendar year 1992.

Respondent Sixta contends that claimant is not entitled to benefits under the Kansas Workers Compensation Act for the reason that the evidence failed to establish that Derewenko had a payroll in excess of \$10,000.00 as required by K.S.A. 44-505. The Appeals Board does not agree and adopts the findings of the Administrative Law Judge with respect to that issue. Based upon the number of houses that Derewenko's company framed in 1992, the Appeals Board finds that Derewenko's payroll approximated \$20,000.00 for that calendar year. Therefore, claimant's employment relationship with Derewenko is subject to the Kansas Workers Compensation Act.

(5) The Appeals Board finds that respondents Pat Pendergast and Bill Sixta are financially unable to pay to claimant the benefits to which he is entitled under the Kansas Workers Compensation Act and, therefore, the Kansas Workers Compensation Fund should be ordered to pay these benefits pursuant to K.S.A. 44-532a.

K.S.A. 44-532a provides:

“(a) If an employer has no insurance to secure the payment of compensation, as provided in subsection (b) (1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits, including medical compensation, to which such injured worker is entitled, to be paid from the workers compensation fund. Whenever a worker files an application under this section, the matter shall be assigned to an administrative law judge for hearing. If the administrative law judge is satisfied as to the existence of the conditions prescribed by this section, the administrative law judge may make an award, or modify an existing award, and prescribe the payments to be made from the workers compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the commissioner of insurance shall cause payment to be made to the worker in accordance therewith.”

As provided by K.S.A. 44-503, references to the principal shall be substituted for references to the employer in the above statute.

The evidence is uncontroverted that Pendergast and Sixta did not have workers compensation insurance pertaining to their construction enterprise. Pendergast testified that he did not have the funds to pay the temporary total disability benefits that had been previously ordered by the Administrative Law Judge, nor the financial capacity to pay the medical expense related to the accident. Pendergast refused to answer any questions regarding his assets and any other questions regarding his ability to pay benefits. Sixta testified that he does not know if Pendergast is financially responsible and able to pay the benefits ordered by the Administrative Law Judge, but believes that Pendergast is experiencing financial difficulties as several suppliers looking for Pendergast for money have come to him. Regarding his own financial ability, Sixta represented to the Administrative Law Judge at the Hearing for Penalties held on March 5, 1993, that \$600.00 was all he could afford to pay towards satisfaction of the Preliminary Hearing Order relating to payment of temporary total and medical benefits. No evidence was presented to controvert these facts.

The Appeals Board finds that the evidence presented establishes that respondents Pendergast and Sixta are financially unable to pay the benefits awarded claimant. Although the Appeals Board would prefer to have more detailed information regarding the financial condition of the respondents, such as their assets and liabilities, the evidence presented does establish that it is more probably true than not that the respondents Pendergast and Sixta have insufficient cash flow to pay the benefits owed to claimant as they come due.

The primary purpose of the Workers' Compensation Act is to expeditiously provide an award of compensation in favor of an injured employee. Workers Compensation Fund v. Silicone Distributing, Inc., 248 Kan. 551, 809 P.2d 1199 (1991); and Hobelman v. Krebs Construction Co., 188 Kan. 825, § 5, 366 P.2d 270 (1961). The Legislature intended, by enacting K.S.A. 44-532a, that the Workers' Compensation Fund be the party responsible for pursuing those respondents who are without insurance and refuse to pay benefits as ordered when it appears they are financially unable to meet their obligation under the Act.

Pursuant to K.S.A. 44-532a(b) the Commissioner of Insurance, acting as the administrator of the Workers Compensation Fund, then has a cause of action against the respondents to recover the amounts paid to the claimant.

(6) Claimant is entitled to an award for medical care and treatment incurred as a result of the work-related accident of September 14, 1992. Additionally, future medical expense may be awarded upon proper application to the Director. Claimant is entitled to an award of unauthorized medical expense for the services rendered by Dr. Shechter, not to exceed the statutory limit.

(7) As a result of claimant's accidental injury, he was temporarily and totally disabled for the period September 15, 1992 through December 29, 1992, at which time he was released to return to work. Accordingly, claimant is entitled to fifteen (15) weeks of temporary total disability benefits at the rate of \$299.00 for a total of \$4,485.00.

(8) The Administrative Law Judge did not err when he omitted mention of the penalty in the sum of \$600.00 which was previously assessed in an Order dated April 23, 1993. The Order arising from a hearing to request penalties pursuant to K.S.A. 44-512a is not a preliminary award as contemplated by K.S.A. 44-534a, but is considered a final order and subject to appeal when it is entered. See Waln v. Clarkson Constr. Co., 18 Kan. App. 2d 729, 861 P.2d 1355 (1993). Therefore, the failure of the Administrative Law Judge to recite the terms of the order pertaining to penalty is of no consequence.

(9) Claimant contends the Administrative Law Judge erred when he credited a \$600.00 payment made by Bill Sixta against the award of temporary total compensation rather than against the penalty assessed pursuant to K.S.A. 44-512a. The Appeals Board finds claimant's argument entirely without merit. At the hearing of April 23, 1993, counsel announced to the Administrative Law Judge that on March 5, 1993, claimant had received a payment of \$600.00 from Sixta. This announcement was made by claimant's counsel at the hearing in which he was seeking an order for penalties. We also note that payment was made approximately a month and a half before the Administrative Law Judge entered the order for penalties. Therefore, we conclude the payment was made towards temporary total and the Administrative Law Judge was correct in crediting the \$600.00 payment in the manner that he did.

(10) Under the provisions of K.S.A. 44-503(f), Pat Pendergast and Bill Sixta are entitled to an award against Tony Derewenko for any and all benefits they have paid to the claimant under the Workers Compensation Act as a result of this accidental injury.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard, dated January 28, 1994, and Order Nunc Pro Tunc of February 2, 1994, are modified in that the Kansas Workers Compensation Fund, pursuant to K.S.A. 44-532a, is ordered to pay the benefits awarded by the Administrative Law Judge. All other orders of the Administrative Law Judge are affirmed and adopted by the Appeals Board and incorporated herein by reference as if fully set forth.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of September, 1994.

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BOARD MEMBER

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BOARD MEMBER

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